

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LANCASTER AUTO COLLISION	:	DETERMINATION
	:	DTA NO. 812249
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Period December 1,	:	
1980 through February 29, 1992.	:	

Petitioner, Lancaster Auto Collision, 70 St. Mary's Street, Lancaster, New York 14086, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1980 through February 29, 1992.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on June 15, 1994 at 1:15 P.M. The Division of Taxation filed a letter in lieu of a brief on August 8, 1994. Petitioner filed its letter on October 11, 1994. Petitioner appeared by Nicholas Konst, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kathleen D. Church, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Lancaster Auto Collision for the period at issue.

II. Whether Lancaster Auto Collision has shown that its failure to file sales tax returns and failure to timely pay sales tax due was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

On November 23, 1992, the Division of Taxation ("Division") issued to petitioner, Lancaster Auto Collision ("Lancaster"), a Notice of Determination for the period December 1, 1980 through February 29, 1992 and assessing a sales tax liability in the amount of \$55,370.06, plus penalty and interest. The amount determined to be due and the period of assessment were

identical to those indicated on a Statement of Proposed Audit Adjustment issued to Lancaster on September 3, 1992. The basis of the Notice of Determination and the Statement of Proposed Audit Adjustment was an audit of the business operation of Lancaster. The audit commenced in March 1992 and is described hereinafter.

Lancaster was an active business operation during the audit period but was not registered as a person required to collect sales tax. The business consisted of automotive body repair, collision damage, windshield replacement and automobile body painting. Lancaster was located at 70 St. Mary's Street, Lancaster, New York 14086.

The audit of this business was selected after it was discovered that petitioner was issuing resale certificates with its sales tax identification number even though the records of the Department of Taxation and Finance indicated that the business had been inactive since November 1980. For the quarter ended November 30, 1980, and prior thereto, Lancaster had filed sales tax returns and remitted the tax due. For the audit period, sales tax returns were not filed and sales tax was not remitted.

The auditor made an unannounced visit to the premises and discovered that Lancaster was in operation. On the premises was the owner of Lancaster, John Loukatos. Mr. Loukatos was advised by the auditor that Lancaster should have been filing sales tax returns since November 1980, and Mr. Loukatos responded that in the past he did not have the funds available to pay the sales tax due. The auditor told Mr. Loukatos that the Division wanted to examine the business's books and records to determine its taxable and exempt sales as well as to determine any tax liability for the audit period.

On the appointment date, the auditor was provided with ledger sheets listing monthly sales from December 1985 to February 1992 and a check register for the period March 1981 through November 1991. The bookkeeper who provided the ledger sheets stated that ledger sheets were not provided for the earlier period beginning December 1980 because the sales invoices for the earlier period were not available to establish that the amount reported was the total gross sales including sales tax. The sales invoices for the period December 1985 through

February 1992 were reviewed by the auditor and exempt sales were removed from the computation of taxable sales. No provision was made for exempt sales in the earlier portion of the audit.

The auditor presented Lancaster with blank sales and use tax returns for the audit period. These returns were completed by the bookkeeper and returned to the auditor. The sales and use tax returns indicated total sales of \$788,843.00, while an analysis of check disbursements revealed checks issued in the total amount of \$808,459.00. A comparison revealed expenses exceeding income by \$19,606.00. In addition, an examination of the ledger sheets for the period December 1, 1985 through February 29, 1992 indicated that they totalled \$28,799.00 more than the sales and use tax returns for the same period. Finally, during the examination of the sales invoices, it was discovered that Lancaster had been collecting sales tax but not remitting it.

During the course of the audit, records which were requested and provided included ledger sheets, sales invoices, resale certificates and exempt organization certificates for the period December 1, 1985 through February 29, 1992 and the check register for the entire audit period. Records requested but not provided included Federal and New York State income tax returns and related worksheets, asset depreciation schedules, source documents for journal sheets, banking information, such as, bank deposit slips and monthly bank statements, for the entire audit period and ledger sheets, sales invoices, resale certificates and exempt organization certificates for the period December 1, 1980 through November 30, 1985.

The auditor concluded that the records were inadequate, in that no records were provided for the period December 1, 1980 through November 30, 1985, there were no source documents for the earlier period of the audit, there was no information as to bank deposits, there was no record of cash payouts and there was no sales tax account. The auditor was of the opinion that the totals on the ledger sheets could not be traced to source documents, especially in the first half of the audit period when no documents were provided. In addition, the auditor concluded that internal control procedures did not exist and the accounting records were generally not

auditable.

The auditor performed a detailed audit, looking at all the books and records provided by petitioner. The additional tax due was based upon the taxable sales as shown by Lancaster on the ledger sheets, less any substantiated nontaxable sales.

Lancaster's bookkeeper and representative during the audit testified that by reviewing the sales invoices for the period December 1, 1985 through February 29, 1992, she was able to create the monthly ledger sheets and complete the sales and use tax returns. According to the bookkeeper, yearly ledger sheets were used for the earlier period of the audit to complete the sales and use tax returns because sales invoices were not available. The sales and use tax returns as completed by the bookkeeper were initially used by the auditor to compute a Statement of Proposed Audit Adjustment, dated June 1, 1992, for the period December 1, 1980 through February 29, 1992 which assessed tax due of \$50,987.06, plus penalty and interest.

Subsequently, the auditor returned to the business premises to review the available sales invoices. The bookkeeper testified that he added into taxable sales each customer's insurance deductible which had been eliminated by the bookkeeper. The auditor left the deductible out of taxable sales only where documents were produced to establish that the customer was not charged such amount. The bookkeeper testified that Lancaster did not charge the customer the same amount as the automobile insurance company indicated the repairs were worth. As an example, if the insurance company assessed the damages at \$2,500.00, and the customer had a deductible of \$200.00, Lancaster would charge and collect tax on \$2,300.00. However, unless otherwise established, the auditor computed the sales price at \$2,500.00. Finally, the bookkeeper testified that cash sales were included in the ledger sheets and the sales and use tax returns.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on

the basis of external indices. The resort to external indices is predicated upon a finding of insufficiency in the taxpayer's recordkeeping such that verification of sales is a virtual impossibility (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). In such circumstances, the Division must select a method of audit reasonably calculated to reflect tax due (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219), and the burden is on petitioner to establish by clear and convincing evidence that both the method used to arrive at the tax assessment and the assessment itself are erroneous (Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542).

To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of King Crab Restaurant v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978). The purpose of this examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commn., supra; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989).

B. The auditor requested books and records of Lancaster on his initial visit to the business premises. Lancaster provided sales invoices, ledger sheets, resale certificates and exempt organization certificates for the later portion of the audit period and the check register for the entire period. Sales which lacked nontaxable documentation were deemed taxable. Under these circumstances, it was proper for the Division to rely on the presumption of taxability contained in Tax Law § 1132(c) with respect to the unsubstantiated claimed exempt sales (Matter of Academy Beer Distributors, Tax Appeals Tribunal, January 21, 1993, confirmed 202 AD2d 815, 609 NYS2d 108, lv denied 83 NY2d 759, 616 NYS2d 14).

C. In this case, there is no challenge to the adequacy of the Division's request for and review of Lancaster's books and records for the audit period. Rather, the Division made such request and reviewed the materials presented by Lancaster. In fact, the Division's calculation of

tax due is based on Lancaster's gross sales per the books and records less substantiated nontaxable sales. The Division assessed as taxable unsubstantiated nontaxable sales based on Lancaster's inability to present documentation as requested substantiating that such receipts were not taxable as claimed.

D. Lancaster continues to claim nontaxability with regard to certain challenged amounts, based on alleged deductibles eliminated from sales. In fact, Lancaster's claim has become, most specifically, that eliminating the deductibles from taxable sales will properly reduce the tax due to the amount shown on the June 1, 1992 Statement of Proposed Audit Adjustment. Lancaster has conceded that tax in the amount of \$50,987.06 is due and owing, but improperly including the deductibles in taxable sales has raised the tax liability to \$55,370.06. The only real issue remaining is whether and to what extent Lancaster has established proper nonreceipt of the deductible amounts.

E. Tax Law § 1132(c) sets forth an initial presumption of taxability with regard to receipts such as those at issue herein, and places the burden of establishing nonreceipt upon the person making such claim, i.e., Lancaster (Matter of Sunny Vending Co. v. State Tax Commn., 101 AD2d 666, 475 NYS2d 896). To demonstrate that certain amounts were not subject to tax, as claimed, Lancaster must be able to offer substantiation, in the type of case at hand, specifying the amounts of the particular sales and confirming that the deductible was not included in the sale. Put another way, Lancaster would be expected to present sales invoices or other records of individual sales together with related payment records.

F. At the hearing, Lancaster submitted no direct documentary proof in an attempt to establish that the deductibles were not received as part of its sales. The only evidence Lancaster produced was the testimony of the bookkeeper to the effect that Lancaster did not charge its customers for the deductible amount.

The testimony of the bookkeeper was general, unrelated to any specific transaction and unsupported by direct documentary evidence. There was no testimony or other evidence which linked the initial Statement of Proposed Audit Adjustment amount and the deductibles claimed

to be included in taxable sales. There was not one example of an insurance deductible being improperly included in taxable sales. The sales invoices were not placed into the record of this matter. No explanation for their unavailability was provided. Therefore, no adjustment to the audit findings are warranted.

G. Under Tax Law §§ 1134(a) and 1136(a), as a person required to collect sales tax, Lancaster was required to collect sales tax and file sales tax returns and pay the sales tax due. Its failure to do so justified the imposition of penalty (Tax Law § 1145[a][1]).

Petitioner offered no testimony at hearing to establish reasonable cause for the failure to report or pay any tax. During the audit period, petitioner collected sales tax from its customers, but did not file sales tax returns or remit the tax collected. Petitioner was clearly aware of its responsibilities as it had filed sales tax returns and remitted the tax due prior to the audit period. Under all these circumstances, penalties are sustained.

H. The petition of Lancaster Auto Collision is denied and the Notice of Determination, dated November 23, 1992, is sustained.

DATED: Troy, New York
February 9, 1995

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE